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IN THE
Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,
Petitioner,

v.

PATRICIA HEATON,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred by refusing to review a remand order and holding, contrary to numerous other courts of appeals, that a district court's invocation of 28 U.S.C. § 1447(c) as the basis for a remand order constitutes "magic words" that insulate that order from appellate review, even though it is clear from the face of the remand order that it could not have been based on § 1447(c).

LIST OF PARTIES
AND
CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings before the Fifth Circuit are listed in the Appendix at Pet. App. 1a.

Pursuant to Supreme Court Rule 29.6, petitioner states as follows:

Monogram Credit Card Bank of Georgia is a wholly-owned subsidiary of General Electric Capital Corporation. General Electric Capital Corporation is a wholly-owned subsidiary of General Electric Capital Services, Inc. General Electric Capital Services, Inc., is a wholly-owned subsidiary of General Electric Company, which is a publicly held corporation.

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MONOGRAM CREDIT CARD BANK OF GEORGIA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monogram Credit Card Bank of Georgia ("Monogram") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 231 F.3d 994 and is reprinted at Pet. App. 1a-12a. The opinion of the district court is reprinted at Pet. App. 20a-22a.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2000. A timely petition for rehearing was denied on January 5, 2001. The court of appeals held that, pursuant to 28 U.S.C. § 1447(d), it lacked subject matter jurisdiction to review the order of the district court remanding this case to state court. That ruling is the subject of the instant petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1447(c) and (d), as well as 28 U.S.C. § 1367(c)(3). Those provisions are reproduced at Pet. App. 26a-28a.

STATEMENT OF THE CASE

This petition presents an enduring and acknowledged conflict among the Circuits regarding the scope of appellate jurisdiction to review a district court order remanding a case to state court. Review of remand orders is governed by 28 U.S.C. § 1447(d), which precludes appellate review *only* of those remand orders issued pursuant to 28 U.S.C. § 1447(c). *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988); *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). In the decision below, the Fifth Circuit reaffirmed its unique rule that a district court's invocation of 28 U.S.C. § 1447(c) in a remand order constitutes "magic words" that conclusively insulate that order from appellate review. The Fifth Circuit thus had to ignore what was

evident on the face of the order: the remand order in this case could not have been based on 28 U.S.C. § 1447(c) because the district court dismissed plaintiff's federal claim as a predicate to its remand order.

As the Fifth Circuit acknowledged, Pet. App. 8a, its magic words approach is contrary to the rule in other circuits, which have uniformly held that courts of appeals must determine independently the basis of the district court's remand order, after review of the surrounding circumstances. *See, e.g., Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996); *Carvel v. Thomas and Agnes Carvel Foundation*, 188 F.3d 83 (2d Cir. 1999); *Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997); *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993); *see also In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 709 (7th Cir. 1992); *Engelhardt v. Paul Revere Life Insurance Co.*, 139 F.3d 1346, 1350-51 (11th Cir. 1998); *Executive Software North America, Inc. v. United States District Court for the Central District of California*, 24 F.3d 1545, 1549 (9th Cir. 1994). Moreover, the Fifth Circuit's decision is flatly at odds with numerous decisions from this Court and the other courts of appeals in analogous contexts holding that a district court's characterization of its own actions is not conclusive of the jurisdiction of a reviewing court. *See, e.g., Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976); *Sullivan v. Finkelstein*, 496 U.S. 617 (1990); *Sampson v. Murray*, 415 U.S. 61 (1974); *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 692 F.2d 814 (1st Cir. 1982) (Breyer, J.).

A. Factual Background

In May 1998, plaintiff Patricia Heaton filed a class action complaint against Monogram in Louisiana state court, alleging principally that Monogram's credit card late fees, though permitted by the law in Monogram's home State of Georgia, exceeded the limit prescribed by Louisiana's Consumer Credit Law. The threshold legal issue posed by the complaint was whether Monogram is a "state bank" under the Federal Deposit Insurance Act ("FDIA"). If Monogram is a state bank, the fees it charged were indisputably lawful under federal law and this Court's precedent, because a state bank has a federal statutory right under Section 27 of the FDIA to assess fees and interest charges (including late fees) in any State that would be lawful in its home State. *See* 12 U.S.C. § 1831d(a) (permitting a "state bank" to charge interest "at the rate allowed by the laws of the State, territory, or district where the bank is located," "notwithstanding any State constitution or statute, which is hereby preempted for the purposes of this section"); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996); *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992).

B. Federal District Court Proceedings

Monogram removed the case to federal court, asserting that plaintiff's claims under Louisiana law were completely preempted by Section 27 of the FDIA. *See* 12 U.S.C.

§ 1831d.[1] Plaintiff moved to remand, arguing that Monogram could not invoke complete preemption under the FDIA because Monogram, despite having over $670 million in deposits from its affiliates, was not "engaged in the business of receiving deposits," and thus was not a "state bank" under the FDIA. *See* 12 U.S.C. § 1813(a)(2) (defining "state bank" as a banking institution that is "engaged in the business of receiving deposits" and is "incorporated under the laws of any State"). Monogram noted that plaintiff's position contradicted the determination of the Federal Deposit Insurance Corporation ("FDIC"), the expert agency charged with interpreting and enforcing the FDIA. The FDIC had considered Monogram to be a state bank ever since it approved Monogram's application for deposit insurance in 1988, and the FDIC had concluded expressly in a September 25, 1998 confirmation letter filed with the district court that Monogram was a state bank under the FDIA.[2]

The district court initially denied plaintiff's motion for remand, holding that Monogram was a state bank under the FDIA and that plaintiff's claims were completely preempted. *See* Pet. App. 2a-3a; *see also id.* at 13a-16a. The case was then re-assigned to a newly appointed judge, who denied

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[1] Monogram also contended that the district court had diversity jurisdiction. In the remand order that is on review, the district court concluded that plaintiff had not satisfied the amount in controversy requirement.

[2] More recently, the FDIC issued *General Counsel's Opinion No. 12, Engaged in the Business of Receiving Deposits Other Than Trust Funds*, 65 Fed. Reg. 14568 (Mar. 17, 2000), which provides a thorough analysis of the FDIC's long-standing interpretation that credit card banks (and other institutions) that accept deposits from a parent or affiliate but do not accept deposits from the general public are still "engaged in the business of receiving deposits" and thus are state banks under the FDIA. *Id.* at 14572.

plaintiff's motion to certify an appeal of the order denying a remand, specifically holding that plaintiff had not shown a "'substantial ground for difference of opinion as to whether defendant is a state bank.'" Pet. App. 3a (quoting order). Plaintiff then moved successfully to amend her complaint to assert a federal claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1637(c)(3)(B). Monogram eventually filed a motion for summary judgment on all of plaintiff's claims, and plaintiff's response was deferred to enable her to conduct discovery.

More than a year after plaintiff's motion to remand had been denied, and following the completion of substantial discovery, plaintiff filed a motion to reconsider the denial of her remand motion. She reiterated the same "state bank" arguments that had been previously rejected, adding only the argument that the FDIC's September 25, 1998 confirmation letter was not entitled to deference because Monogram's attorneys had participated in its preparation.

At a hearing on plaintiff's motion, Monogram's counsel argued that the TILA claim prevented remand.[3] This argument prompted the court to suggest that plaintiff could voluntarily dismiss that claim. November 10, 1999 Tr. at 25. Later that same day, plaintiff filed a motion voluntarily to dismiss her TILA claim with prejudice.

The court dismissed the TILA claim with prejudice and, in a separate order that acknowledged the TILA dismissal, remanded the remaining claims to state court. The latter

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[3] *See Burks v. Amerada Hess Corp.*, 8 F.3d 301, 304 (5th Cir. 1993) ("a district court has no discretion to remand a matter in which a federal-law claim still exists").

order held that Monogram is not a "state bank" and that plaintiff's claims were thus not completely preempted under the FDIA. Notwithstanding plaintiff's assertion – and the district court's dismissal with prejudice – of the federal TILA claim, the district court concluded that the court "does not have federal question jurisdiction" and purported to remand the case "pursuant to 28 U.S.C. § 1447(c)." Pet. App. 22a.

C. Fifth Circuit Proceedings

Monogram sought expedited review of the remand order in the Fifth Circuit. Citing settled case law from other courts of appeals, Monogram argued that neither the district court's statement that the court "does not have federal question jurisdiction" nor its statement that remand was "pursuant to 28 U.S.C. § 1447(c)" conclusively determined reviewability. Pet. App. 22a. In this case, as was evident from the face of the remand order, the district court had dismissed plaintiff's TILA claim *with prejudice*, an action that could not have been taken unless the court had subject matter jurisdiction. Monogram argued that the remand order thus could not have been premised on the absence of subject matter jurisdiction, but instead was necessarily a discretionary remand of pendent claims following dismissal of federal claims, *see* 28 U.S.C. § 1367(c)(3); *Cohill*, 484 U.S. at 348, which was unquestionably appealable.

The Fifth Circuit disagreed and, pursuant to 28 U.S.C. § 1447(d), dismissed Monogram's appeal for lack of jurisdiction. The court of appeals held that the district court's characterization of its own order is conclusive for purposes of appellate jurisdiction. The court stated that "the district court is the final arbiter of whether it has jurisdiction to hear the case," *see* Pet. App. 5a (internal quotation and

citation omitted), and, because the district court "stated a § 1447(c) basis for remand," its remand order was insulated from appellate review by § 1447(d). *Id.* (citing *Thermtron*, 423 U.S. at 345-46). The Fifth Circuit expressly acknowledged that Monogram's argument to the contrary was firmly grounded in the "decisions of other circuits," but noted that prior Fifth Circuit cases had adopted a "'magic words'" approach to § 1447(d) that prevents that Circuit from examining the actual basis of the remand once the district court expressly mentions § 1447(c) or the absence of subject matter jurisdiction. *See* Pet. App. 8a (quoting *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758 (5th Cir. 1994)). The Fifth Circuit further held that unless the district court "clearly and affirmatively" relies on a non-1447(c) basis for remand, the court of appeals lacks jurisdiction. Pet. App. 10a. Since the remand order did not expressly rely on a non-1447(c) basis for remand, the remand order was not reviewable.

The Fifth Circuit recognized, however, that the district court could not have dismissed the federal TILA claim with prejudice if the district court did not have jurisdiction over the case. The court of appeals accordingly held that the dismissal of the TILA claim with prejudice was "void," and that Monogram "may file another petition for removal based on the TILA claim once this case is returned to state court." Pet. App. 12a & n.6.

The morning after the panel's decision was released, Monogram removed the case again based on the TILA claim. Unbeknownst to Monogram, however, plaintiff had obtained from the state court an *ex parte* order dated the previous day dismissing any TILA claim still in the case. Plaintiff then sought to remand for lack of subject matter jurisdiction. Disregarding the Fifth Circuit's express assumption that

Monogram would receive a federal forum, the district court once again remanded the case to state court.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's holding that a district court's invocation of § 1447(c) in a remand order constitutes "magic words" that insulate that order from review reaffirms and deepens a long-standing conflict between the Fifth Circuit on one side and all other Circuits that have addressed the issue on the other. Seven other Circuits have held that a district court's characterization of its own remand order is not conclusive of the order's reviewability, and that an appellate court must engage in an independent analysis of the district court's actions to determine appellate jurisdiction. This Court has applied that same rule in analogous contexts. The Fifth Circuit's sustained departure from the rule prevailing in this Court and the other courts of appeals merits this Court's review.

Had the Fifth Circuit undertaken the required independent review, it would have concluded from the face of the district court's remand order that the order was reviewable. The district court purported to remand for lack of subject matter jurisdiction, as permitted by § 1447(c), but it did so only after dismissing with prejudice a federal statutory claim plaintiff had previously asserted. Such an action (as the Fifth Circuit acknowledged) requires subject matter jurisdiction, and that jurisdiction, in turn, makes any remand after dismissal of the federal claim both discretionary and appealable. *See Cohill*, 484 U.S. 343; *see also infra* at 25 n.12. Numerous other courts of appeals have acknowledged that similar remand orders do not fall within the bar of § 1447(d).

The Fifth Circuit's approach has important consequences for courts and litigants alike. By letting the district court's characterization of its own order determine reviewability, the Fifth Circuit facilitates disparate results and disrespect for the judiciary that appellate review is designed to prevent. Moreover, the Fifth Circuit's approach frustrates Congress' intent that discretionary remands be reviewable, and it deprives defendants of their right to have their case resolved in a federal forum. Thus, regardless of the importance of the particular remand order on review, the conflict presented by the decision below warrants this Court's review.

In this case, the significance of the underlying remand order renders this Court's review imperative. The district court held that Monogram is not a "state bank" under the FDIA despite the fact that the FDIC, which has regulatory and interpretive authority over the FDIA, has treated Monogram as a "state bank" since 1988, when it issued an order granting Monogram deposit insurance. Indeed, the FDIC submitted a letter to the district court prior to the remand order reaffirming that Monogram is a state bank under the FDIA and, recently, issued a general counsel's opinion, approved by the FDIC's Board of Directors, that expressly rejects the district court's opinion and terms it "irrational."[4] The FDIC has warned that the district court's erroneous resolution of the state bank issue "may affect hundreds of similarly situated FDIC-insured institutions processing billions of dollars in transactions" and "may literally open the floodgates of litigation and deluge the institutions regulated by the FDIC with a torrent of similarly

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[4] *General Counsel's Opinion No. 12*, 65 Fed. Reg. at 14571.

frivolous suits."[5] *See also* Fifth Circuit Brief of Amicus Curiae Conference of State Bank Supervisors, *et al.*, at 5, 8 (filed March 29, 2000) (noting that the district court's decision "hinders the safety and soundness of our banking system" and "threatens to destroy . . . the competitive equality that Congress has established between State banks and national banks").

The Fifth Circuit forthrightly conceded that Monogram's appeal presents "significant questions of law concerning the interpretation of the FDIA and the ability of courts to 'second-guess' the FDIC's determinations about whether financial institutions are 'state banks' under the FDIA." Pet. App. 11a. The Fifth Circuit declined nevertheless to resolve those questions, holding that the district court's utterance of "magic words" prevented appellate review. This petition thus vividly illustrates the serious consequences of the Fifth Circuit's unique, narrow view of its appellate jurisdiction. Accordingly, this Court should grant this petition and resolve the conflict over the scope of appellate jurisdiction to review remand orders under 28 U.S.C. § 1447(d).

A. The Fifth Circuit's Reliance on a "Magic Words" Doctrine to Determine the Reviewability of Remand Orders Conflicts with the Decisions of Every Other Circuit to Have Considered the Issue.

The language of 28 U.S.C. § 1447(d) provides broadly that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or

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[5] Memorandum of Points and Authorities in Support of the Federal Deposit Insurance Corporation's Motion for Leave to Intervene as a Party Defendant at 4 (filed Nov. 22, 1999).

otherwise." This Court has repeatedly made clear, however, that § 1447(d), despite its broad language, prohibits appellate review of *only* those remand orders actually issued pursuant to § 1447(c), namely remands on the ground of "any defect" or due to "lack of subject matter jurisdiction."[6] *See Thermtron*, 423 U.S. at 345-46; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Quackenbush*, 517 U.S. at 711-12. A remand order is not issued pursuant to § 1447(c), and is thus reviewable, when, for example, the remand order is based on concerns of docket management, *see Thermtron*, 423 U.S. at 345-46, or the abstention doctrine, *see Quackenbush*, 517 U.S. at 711-12, or – more critically for the instant petition – when the remand order involves the discretionary remand of supplemental state claims following the dismissal of federal claims, *see Cohill*, 484 U.S. at 348.

In the decision below, the Fifth Circuit reaffirmed its own precedent that treats the district court's mere invocation of § 1447(c) or the words "lack of subject matter jurisdiction" in a remand order as "magic words" that conclusively establish that the order was issued pursuant to § 1447(c) and is thus unreviewable under § 1447(d). *See* Pet. App. 8a; *see also Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994) ("The magic words 'this case does not contain a federal claim' rendered the district court's remand order unreviewable."); *Richards v. Federated Dep't Stores, Inc.*, 812 F.2d 211, 212 n.1 (5th Cir. 1987) (per

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[6] At the time of *Thermtron*, § 1447(c) provided for remand if the case was removed "improvidently or without jurisdiction." *See Thermtron*, 423 U.S. at 342; *see also Cohill*, 484 U.S. at 346 n.2. In 1988, Congress modified that language to permit remand "on the basis of any defect in removal procedure" or if the district court "lacks subject matter jurisdiction." In 1996, the reference to "removal procedure" was deleted.

curiam) ("orders which recite the magic words [improvidently and without jurisdiction] . . . are 'not subject to challenge in the court of appeals by appeal, by mandamus or otherwise'"); *Tillman v. CSX Transportation, Inc.*, 929 F.2d 1023, 1026 (5th Cir. 1991) ("incantation" of the phrase, "lacks subject matter jurisdiction" has "magical effect").[7] In so doing, the Fifth Circuit resolved a question posed in *Thermtron*, but did so in a way that conflicts with both the logic of *Thermtron* and, as the Fifth Circuit recognized, numerous "decisions of other circuits" -- indeed, it directly conflicts with the decisions of *seven* other Circuits.

In *Thermtron*, this Court held that Congress intended § 1447(d) to immunize only those remands listed in § 1447(c), and did not "intend[] to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." 423 U.S. at 351. In discussing the ramifications of the majority's approach, the *Thermtron* dissent hypothesized a case in which the district court "state[s] that it finds no jurisdiction, using the rubric of § 1447(c), but the papers plainly demonstrate such a conclusion to be absurd." *Id.* at 357 (Rehnquist, J., dissenting). In that situation, the dissent argued, "[i]f the Court's grant of certiorari and order of reversal in this case are to have any meaning, it would seem that such avenues of attack should clearly be open to potential opponents of orders of remand." *Id.* This case squarely presents the problem identified by the now-Chief Justice, and the Fifth Circuit's

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[7] *See also Smith v. Texas Children's Hosp.*, 172 F.3d 923, 925-26 (5th Cir. 1999); *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 408 (5th Cir. 1991).

refusal to review the district court's order is thus at odds with *Thermtron*.

Seven courts of appeals have followed the logic of *Thermtron* and rejected an approach that gives conclusive effect to the district court's characterization of its own order. In *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996), for example, plaintiff brought a tort suit against a government contractor and a federal official in state court. The case was removed to federal court, and, shortly thereafter, the claims against the federal official were dismissed. After determining that the remaining defendant was not entitled to any immunity from suit, the district court remanded the case to state court. The remand order stated explicitly that "[w]ithout the federal defendant there is no longer any basis for federal jurisdiction because diversity does not exist among the remaining parties"; it also stated expressly that the action is remanded "pursuant to 28 U.S.C. § 1447(c)." *Id.* at 1452 (Phillips, J., opinion of the court with respect to subject matter jurisdiction).

Despite the district court's invocation of § 1447(c), the Fourth Circuit exercised jurisdiction over the appeal and vacated the remand order. Explicitly rejecting the Fifth Circuit's magic words approach,[8] the majority held that "powerful policy considerations and persuasive decisional

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[8] The dissent in *Mangold* expressly invoked the Fifth Circuit's magic words approach, arguing that the words in the district court's order "'are indeed magic ones: the order is proof against review even if it merely 'purports' to remand on the ground quoted.'" *Id.* at 1456 (Michael, J., dissenting) (quoting *Richards*, 812 F.2d at 212 n.1). The dissent argued that "where, as here, a district court ordered remand (even erroneously) using the magic words of § 1447(c), review of that order was prohibited under § 1447(d)." *Id.* at 1458

authority support our power – and responsibility – to look past contextually ambiguous allusions and even specific *citations* to § 1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand." *Id.* at 1450 (emphasis in original). The majority emphasized that "neither the citation of § 1447(c) nor the failure to cite it as presumed authority for a remand is conclusive of the real question: whether one of its two grounds is the actual basis being invoked as authority for remand." *Id.*[9]

The Second Circuit's decision in *Carvel v. Thomas and Agnes Carvel Foundation*, 188 F.3d 83 (2d Cir. 1999), is to the same effect. In that case, a foundation brought suit in state court against the trustee of a decedent's estate to enjoin the distribution of certain property of the estate. The trustee removed the case to federal court. In remanding the case to state court, the district court "explicitly stated that it lacked jurisdiction" to decide the claims concerning the estate property, *id.* at 85, and it concluded expressly that it "lacks subject matter jurisdiction over every claim for relief other than the claims for declaratory judgment." *In re Thomas and Agnes Carvel Foundation*, 36 F. Supp. 2d 144, 152 (S.D.N.Y. 1999). When the trustee sought review, the Second Circuit took jurisdiction, notwithstanding the district court's reliance on lack of subject matter jurisdiction. The Second Circuit observed that the district court had based its

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[9] *See also Borneman v. United States*, 213 F.3d 819, 825 (4th Cir. 2000) (reviewing and reversing district court's remand order despite district court's remand pursuant to § 1447(c) for lack of subject matter jurisdiction and despite the Fourth Circuit's concession that "if we are to accept [the district court's] conclusion, § 1447(d) would, at first blush, appear to bar us from reviewing the district court's order"), *cert. denied*, 121 S. Ct. 759 (2001).

opinion on *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939), which the court of appeals viewed as an abstention case. 188 F.3d at 85-86. The Second Circuit thus decided that, notwithstanding the district court's characterization of its own order, the remand was actually based on abstention, not jurisdiction, and thus was reviewable. *Id.* at 86.

Numerous other circuits have adopted the same approach. The Tenth Circuit, for example, citing liberally from the majority opinion in *Mangold*, *see supra*, has held that "[m]ere mention of § 1447(c) or the 'magic words' of subject matter jurisdiction, however, do not automatically render a remand order nonreviewable under § 1447(d)." *Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997); *see also Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir. 1998) ("An explicit reference to § 1447(d) does not automatically render a remand order nonreviewable . . . . In order to evaluate the reviewability of the district court's remand orders, we must independently review the record to determine the actual grounds upon which the district court believed it was empowered to remand."); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) ("A district court's assertion that it lacks jurisdiction, and even explicit references to § 1447(c), does not automatically render a remand order nonreviewable under § 1447(d)."). And, in *In re TMI*, 940 F.2d 832 (3d Cir. 1991), the Third Circuit reviewed a remand order even though the district court had declared the underlying jurisdictional statute unconstitutional and then remanded for lack of subject matter jurisdiction pursuant to § 1447(c). 940 F.2d at 848.

The Sixth Circuit, the Ninth Circuit, and the Eleventh Circuit have similarly rejected a magic words approach. *See,*

e.g., *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993) ("[l]ooking behind the face of the order" to determine the basis of the remand); *see also id.* at 1350-51 (Celebrezze, J., dissenting) ("The mere incantation of the mantra '§ 1447' should not be enough to preclude review if it appears to this court that this is not a § 1447 order. I do not believe the majority would disagree. Hence, this court must attempt to determine the justifications supporting the order to determine if they are consistent with a § 1447 order."); *Kunzi v. Pan American World Airways, Inc.*, 833 F.2d 1291, 1294 (9th Cir. 1987) (looking past the district court's explicit citation to 1447(c) and analyzing the hearing transcripts and "[c]onsidering the entire record" before dismissing the appeal); *Poore v. American-Amicable Life Insurance Co. of Texas*, 218 F.3d 1287, 1291-92 (11th Cir. 2000) (reviewing remand order even though the order was based on the district court's determination that "it lacked diversity jurisdiction because the amount in controversy did not meet the jurisdictional minimum set forth in 28 U.S.C. § 1332").

Leading treatises confirm that the Fifth Circuit's approach is out of step with the more flexible approach adopted by the other circuits. Professors Wright, Miller, and Cooper have noted, for example, that "[a]ppellate courts frequently look beyond the district court's citation . . . to Section 1447(c); instead, they engage in independent review of the actual grounds upon which the district court justified its decision to remand." 14C Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 3740, at 533-40 (3d ed. 1998). And Professor Moore has noted that the "Fifth Circuit has taken a strict approach" to the review of remand orders. 16 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 107.44[2][c], at 107-227 (3d ed. 2000); *see also id.* at 107-

227 n.41.1 (citing *Smith v. Texas Children's Hospital*, 172 F.3d 923 (5th Cir. 1999), for the proposition that the "Fifth Circuit will not look beyond language of the remand order to surrounding circumstances to determine whether remand was based on substantive decision on merits").

In short, the Fifth Circuit's reliance on magic words as conclusive in determining the reviewability of remand orders is in direct conflict with the approach adopted by seven other Circuits, and cannot be reconciled with *Thermtron* and its progeny. Review by this Court is thus appropriate and necessary.

B. The Fifth Circuit's Refusal to Review a Remand Order Issued after the District Court Exercised Subject Matter Jurisdiction over the Case Conflicts with Numerous Decisions of Other Courts of Appeals.

The Fifth Circuit's application of the magic words doctrine in this case was critical because an independent review of the district court's actions compels the conclusion that the order was reviewable.

Once the district court by word or action acknowledges jurisdiction, a subsequent remand for lack of subject matter jurisdiction – based for example on the amendment of the complaint or the addition or deletion of a party – is reviewable. *See, e.g., In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 709 (7th Cir. 1992); *see also Baldridge*, 983 F.2d at 1348 (explaining that if a district court "thought that the removal had been jurisdictionally proper but that jurisdiction had 'vanished' when [a party] dropped out, the remand – even though based on a finding of lack of

jurisdiction – would be reviewable."); *Survival Systems of the Whittaker Corp. v. United States District Court for the Southern District of California*, 825 F.2d 1416, 1418 (9th Cir. 1987) ("[R]emand could not possibly have been based on section 1447(c); removal had not been 'without jurisdiction,' since five of [plaintiff's] claims were held to be preempted by federal law. The statutory preclusion of review under section 1447(d) is therefore not applicable."); *Poore*, 218 F.3d at 1291-92 (remand order was reviewable because district court premised its conclusion that it lacked subject matter jurisdiction on a damages limitation contained only in the amended complaint).[10] Such a remand is necessarily a reviewable "*Cohill* remand" – now a remand pursuant to 28 U.S.C. § 1367(c)(3)[11] – in which the district court utilizes its discretion to dismiss state claims after federal claims asserted in the complaint have been dismissed.

In this case, after plaintiff voluntarily amended her complaint to add a federal TILA claim, the district court dismissed that claim with prejudice. As the Fifth Circuit acknowledged, a dismissal with prejudice could only have been entered if the district court had subject matter jurisdiction over the amended complaint. Pet. App. 11a-12a. Thus, the only reasonable way to square the district court's dismissal of the TILA claim with the remand for lack of

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[10] The Fifth Circuit is the lone Circuit to hold to the contrary. *See Linton v. Airbus Industrie*, 30 F.3d 592, 599 (5th Cir. 1994) (remand for lack of subject matter jurisdiction not reviewable even if district court thought it had jurisdiction at the time of removal and then remanded only after a subsequent event caused jurisdiction to be "lost").

[11] Section 1367(c)(3) provides, in part, that a district court "may decline to exercise supplemental jurisdiction over a claim if . . . the district court has dismissed all claims over which it has original jurisdiction."

subject matter jurisdiction is to hold that the district court thought it had subject matter jurisdiction as a result of the federal TILA claim, and thought it lost that jurisdiction because the TILA claim was dismissed.

As other courts of appeals have made clear, remands in such cases are reviewable. Judge Easterbrook's unanimous opinion in *In re Amoco* is directly on point. In that case, an employment dispute alleging state law claims was removed to federal court on the theory that the suit required interpretation of a collective bargaining agreement and thus was within federal law. Without explanation, the district court initially denied a motion to remand but then, after the employee's union dropped out as co-plaintiff, granted a motion to reconsider and remanded for lack of subject matter jurisdiction. The Seventh Circuit held the remand order reviewable, noting that "[t]he only way to make the orders consistent is to assume that the judge believed that so long as the union was a plaintiff, there was federal-question jurisdiction, which vanished when the union dropped out. If that was indeed the court's approach, then we may review the order by mandamus." 964 F.2d at 709; *see also Engelhardt v. Paul Revere Life Insurance Co.*, 139 F.3d 1346, 1350-51 (11th Cir. 1998) (because "[t]he district court demonstrated its belief that it had original subject matter jurisdiction over the ERISA claim by expressly retaining jurisdiction over the issue of statutory attorney's fees and interest," the court's "subsequent remand of the related state law claim was necessarily a decision not to exercise supplemental jurisdiction under § 1367(c)(3)"); *Executive Software North America, Inc. v. United States District Court for the Central District of California*, 24 F.3d 1545, 1549 (9th Cir. 1994) ("[W]e have held that asserting original jurisdiction over at least one of the claims removes the possibility that a remand

order is issued pursuant to section 1447(c). Accordingly, the remand order in this case is reviewable.") (internal citation and quotation omitted); *Survival Systems*, 825 F.2d at 1418 (holding that a remand order was reviewable because "remand could not possibly have been based on section 1447(c) . . . since five of [plaintiff's] claims were held to be preempted by federal law").

The Fifth Circuit's reliance on the magic words doctrine to deny review despite the district court's dismissal of the TILA claim with prejudice is flatly inconsistent with these cases. Because access to federal courts should not turn on the fortuity of geography, this Court should grant the petition in this case.

C. The Fifth Circuit's Approach Conflicts with Numerous Decisions of this Court and the Courts of Appeals Holding in Analogous Contexts that a District Court's Characterization of its Own Actions Is Not Conclusive of the Reviewability of Those Actions.

The Fifth Circuit's approach also conflicts with abundant precedent from this Court and the courts of appeals in analogous contexts that "[t]he label attached by the District Court to its own opinion does not, of course, decide for us the jurisdictional issue," and that the appellate court must "determin[e] the question of appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was." *United States v. Sisson*, 399 U.S. 267, 279 n.7 (1970) (internal quotation omitted) (alteration in *Sisson*).

In *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), respondent asked this Court to dismiss an appeal filed by the Secretary of Health and Human Services on the ground that there was no "final judgment." This Court denied respondent's request, despite the fact that "the District Court did not caption its order as a 'judgment,' much less a 'final judgment.'" *Id.* at 628 n.7. The Court stated unequivocally that "[t]he label used by the District Court of course cannot control the order's appealability in this case." *Id.*

Similarly, in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), the court of appeals had taken jurisdiction over an appeal, reasoning that because the district court had "made the recital required by Fed. R. Civ. Proc. 54(b) that final judgment be entered on the issue of liability, and that there was no just reason for delay, the orders thereby became appealable as a final decision pursuant to 28 U.S.C. § 1291." *Id.* at 742. This Court disagreed, holding that the district court's recitation was not conclusive of appealability: "[D]espite the fact that the District Court undoubtedly made the findings required under the Rule had it been applicable, those findings do not in a case such as this make the order appealable pursuant to 28 U.S.C. § 1291." *Id.* at 742-43.

In *Sampson v. Murray*, 415 U.S. 61 (1974), the district court issued orders preventing discharge of a probationary employee pending review of her termination. Although the district court labeled its order as a temporary restraining order ("TRO"), *see* 415 U.S. at 67 n.8, which would normally be unreviewable, this Court held that the order was reviewable because the order was, in the Court's judgment, actually a preliminary injunction. *Id.* at 87-88. *See also Carson v. American Brands*, 450 U.S. 79 (1981) (holding that this Court has jurisdiction to review a district court's

refusal to accept a consent decree that would have imposed affirmative obligations on employer because that refusal was effectively a denial of an injunction reviewable under § 1292(a)(1)).

The courts of appeals have uniformly followed suit. For example, in *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 692 F.2d 814 (1st Cir. 1982), the court of appeals took jurisdiction of an appeal despite the district court's characterization of its order as a TRO. Writing for a unanimous panel, then-judge Breyer stated that "the use of the 'temporary restraining order' label by a district court does not defeat appealability if the order is in substance a preliminary injunction." *Id.* at 816; *see also In re Slimick*, 928 F.2d 304, 308 (9th Cir. 1990) ("It is irrelevant that the court designated the first disposition an order and the later disposition a judgment. Appealability turns on the effect of the ruling, not the label assigned to it by the trial court."); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1199 n.4 (9th Cir. 1975) (reviewing "discovery order" and noting that "appealability turns not on labels but on the substantial impact of the order"); *Spates v. Manson*, 619 F.2d 204, 209 n.3 (2d Cir. 1980) (Friendly, J.) ("It is clear that nothing turns on the use of the word 'judgment' or the statement that 'summary judgment be and is hereby entered in favor of the Plaintiffs in accordance with the Court's Memoranda of Decision.' . . . Appealability turns on what has been ordered, not on how it has been described.").

The Fifth Circuit's refusal to look beyond the district court's characterization of its own order cannot be reconciled with this unbroken line of cases and thus merits this Court's review.

D. The Fifth Circuit's Magic Words Approach Cannot Be Justified By Precedent or Policy.

In the face of the uniformity among the cases of this Court and the courts of appeals, the Fifth Circuit's magic words approach cannot be sustained. As members of this Court have observed, "it make[s] little sense to rest reviewability *vel non* on the tag the trial court elects to place on its ruling." *Things Remembered, Inc.*, 516 U.S. at 134 (Ginsburg, J., concurring) (internal quotation and citation omitted). Such an approach facilitates manipulation by the parties and the district courts and, at the very least, creates the perception of unfairness and abuse. As the Court noted in *Sampson v. Murray*, "[a] district court, if it were able to shield its order from appellate review merely by [its] designati[on]" would have "virtually unlimited authority over the parties." 415 U.S. at 86-87. *Cf. Thermtron*, 423 U.S. at 351 (Congress did not "intend[] to extend carte blanche authority to the district courts to revise the federal statutes governing removal").

The Fifth Circuit was unconvinced that its decision would engender these severe consequences, noting that it "seriously doubt[ed]" that federal courts would abuse the power to render their orders unreviewable. Petitioners need not take issue with the court's analysis, *cf. Sykes v. Texas Air Corp.*, 834 F.2d 488, 492 n.15 (5th Cir. 1987) ("[w]e do not mean to suggest that federal district courts are prone to manipulate legal doctrine"), to note that it is beside the point. The key question is "whether rules of appellate jurisdiction that give incentives for manipulation are wise." *Id.* In determining the scope of appellate jurisdiction, this Court has consistently recognized that giving conclusive effect to a district court's label is profoundly unwise. The Fifth

Circuit's contrary conclusion in the context of § 1447(d) cannot stand.

None of the other justifications offered by the Fifth Circuit remotely justifies the magic words approach. The Fifth Circuit sought, for example, to sidestep the serious consequences of its approach by stating that "Congress struck the balance of competing interests in favor of judicial economy." Pet. App. 11a (internal citation and quotation omitted). The Fifth Circuit's assessment of the congressional interests is, however, incomplete at best. As this Court made clear in *Cohill*, although Congress intended to preclude review of remands issued pursuant to § 1447(c), Congress intended to permit review of discretionary (*i.e.*, non-Section 1447(c)) remands, notwithstanding any concerns over judicial economy.[12] Indeed, review of discretionary remands is critical to judicial economy, because it ensures that district courts, before exercising their discretion to remand state claims once the original basis of federal jurisdiction has been eliminated, have properly considered the effect of proceedings already conducted by the federal court. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 173 (1997) (holding that § 1367(c) "reflects the understanding" that a district court deciding whether to exercise supplemental jurisdiction must consider, among other things, "judicial economy"); *see also Cohill*, 484 U.S.

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[12] The courts of appeals have unanimously held that discretionary remands – whether pursuant to 28 U.S.C. § 1367(c)(3) or (prior to the enactment of that statute) pursuant to *Cohill* – are reviewable. *See, e.g., In re U. S. Healthcare, Inc.*, 193 F.3d 151, 159 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 2687 (2000); *Engelhardt*, 139 F.3d at 1350-51; *St. John v. International Association of Machinists and Aerospace Workers*, 139 F.3d 1214, 1216-17 (8th Cir. 1998); *see also Things Remembered, Inc.*, 516 U.S. at 130 (Kennedy, J., concurring) (citing cases).

at 350 n.7 (citing "judicial economy" as one of the factors to be considered in deciding whether to remand state claims following the dismissal of all federal claims). Allowing a discretionary remand order to evade the appellate review mandated by the Supreme Court and Congress when the face of the order makes clear that the district court mischaracterized the basis for remand flouts, rather than furthers, congressional intent.

Moreover, the Fifth Circuit's opinion is itself antithetical to considerations of judicial economy, as even the Fifth Circuit realized. *See* Pet. App. 12a n.6. The Fifth Circuit's application of the magic words doctrine forced the court to hold that the district court's dismissal of the TILA claims was null and void and that Monogram could again remove the case to federal court. *Id.* The Fifth Circuit thus permitted remand while concluding expressly that the case was immediately removable. That approach not only is illogical (thus demonstrating the flaws in the magic words approach), it triggered an entirely unnecessary set of filings and briefings.

Even worse, the Fifth Circuit's approach triggered an unseemly race to the courthouse. Relying on the Fifth Circuit's assurance that Monogram may "file another petition based on the TILA claim once this claim is returned to state court," *id.*, Monogram filed a second removal motion on the morning after the Fifth Circuit's opinion was issued, only to learn shortly thereafter that plaintiff had obtained an *ex parte* order from the state court dismissing the TILA claim the day before (*i.e.*, on the day the Fifth Circuit's opinion was issued). That dismissal caused the district court to grant plaintiff's subsequent motion to remand. Thus, notwithstanding the Fifth Circuit's expectation that

Monogram would ultimately have its claims resolved in federal court, Monogram has once again had its case remanded as part of plaintiff's continuing effort to deprive Monogram of its statutory right to a federal forum. Congress could not have intended the resolution of critical questions of federal law to depend on who wins the post-appeal race to the courthouse. *See, e.g., Mobil Oil Exploration Co. v. FERC*, 814 F.2d 998, 1000 (5th Cir. 1987) (per curiam) ("Such races-to-the-courthouse distort the true intendment of the statutory scheme.").

Equally unpersuasive is the Fifth Circuit's attempt to justify its result based on the statement in *Thermtron* that only remand orders "issued under § 1447(c) and invoking the grounds specified therein" are insulated from review. Pet. App. 4a (internal citation and quotation omitted). That language only poses, rather than answers, the question presented in this petition, namely, how should a court of appeals determine when an order is "issued under § 1447(c)." As all of the other courts of appeals faced with the issue have concluded, the proper way to make that determination is not to rely on magic words used by the district court, but instead independently to review the record to determine the actual grounds of the district court's decision. *See also supra*, at 13 (showing that the logic of *Thermtron* precludes reliance on "magic words").

In sum, the Fifth Circuit's opinion creates a regime in which a remand order that Congress made reviewable is rendered non-reviewable simply because the district court – wittingly or unwittingly – intoned the magic words of § 1447(c). That regime, is inconsistent with precedent, congressional intent, and common sense, and thus merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

Appendix A

United States Court of Appeals,
Fifth Circuit.

Patricia HEATON, Plaintiff-Appellee,
v.
MONOGRAM CREDIT CARD BANK OF GEORGIA,
Defendant-Appellant.

No. 99-31341.

Nov. 2, 2000.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before DUHE, EMILIO M. GARZA and DeMOSS, Circuit Judges.

DUHE, Circuit Judge:

Monogram Credit Card Bank of Georgia ("Monogram") appeals the district court's order remanding this case to state court pursuant to 28 U.S.C. § 1447(c). Because Congress has specifically excluded this type of remand order from appellate review, we conclude that we lack jurisdiction and therefore DISMISS Monogram's appeal.

BACKGROUND

We summarize only the facts relevant to the issues in dispute in this appeal. Monogram, a Georgia credit card bank, issued a credit card to Patricia Heaton ("Heaton") to finance purchases from a retail store called Campo Appliances. Heaton brought a class action lawsuit in state

court, alleging that Monogram charged late fees on the card in excess of the limit provided under the Louisiana Consumer Credit Law ("LCCL"), La. R.S. 9:3527. Heaton also alleged breach of contract.

Monogram removed the suit. It argued that there was a basis for federal subject matter jurisdiction because Heaton's claims were completely preempted by Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d. Section 27 of the FDIA authorizes federally-insured "state banks" (as defined under Section 3(a)(2) of the FDIA, 12 U.S.C. § 1813(a)(2)) to charge late fees permitted by the laws of their home states. Georgia law provides for a higher late fee limit than the LCCL. Monogram also argued that the parties were diverse and, pursuant to *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995), Heaton's demand for attorney's fees under the LCCL caused the amount in controversy to exceed $75,000.

Heaton sought remand, arguing that Monogram could not invoke complete preemption because it was not a "state bank" under the definition contained in Section 3(a)(2) of the FDIA. Section 3(a)(2) defines state banks as those which are "engaged in the business of receiving deposits" and which are incorporated under state law. Part of Heaton's argument was that because Monogram accepts deposits only from its parent company and not from its customers, it could not be engaged in the business of receiving deposits. She also contended that *In re Abbott Laboratories* was inapplicable, and therefore the court lacked diversity jurisdiction.

Judge Porteous denied Heaton's motion, concluding that under the plain language of the FDIA, Monogram was a "state bank." He also cited a letter from the Federal Deposit

Insurance Corporation ("FDIC") in which the FDIC stated that it considered Monogram to be a state bank. Therefore, Heaton's claims were completely preempted.[1] Less than a week after the denial of remand, the case was re-assigned to Judge Barbier. Judge Barbier denied Heaton's petition for an interlocutory appeal of the denial of remand, finding that there was no "substantial ground for difference of opinion as to whether the defendant is a state bank." *Heaton v. Monogram Credit Card Bank of Georgia*, No. 98-1823 (E.D. La. Nov. 25, 1998) (minute entry denying permission to appeal).

Thereafter, Heaton moved to amend her petition to assert a federal claim under the Truth in Lending Act ("TILA"), specifically 15 U.S.C. § 1637(c)(3)(B). This claim was not related to the credit card late fees. A magistrate judge denied this motion, but Judge Barbier vacated the magistrate judge's order and allowed Heaton to assert the TILA claim.

Later, Heaton discovered that Monogram had participated in the preparation of the FDIC letter that Judge Porteous had cited in his order denying the motion to remand. Heaton then moved for a reconsideration of her motion. Judge Barbier granted the motion and remanded the case to state court, citing 28 U.S.C. § 1447(c). The judge rejected Monogram's argument that Heaton had waived her objection to the earlier denial of remand by amending her petition to add the TILA claim. On the same day that he signed the remand order, Judge Barbier granted Heaton's voluntary motion to dismiss

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[1] The judge's order did not address the question of diversity jurisdiction.

that claim with prejudice, and noted the dismissal in a footnote in the remand order.

In granting the motion to remand, Judge Barbier concluded that Monogram was not a "state bank" because it was not "engaged in the business of receiving deposits" under Section 3(a)(2). He reasoned that because Monogram only receives deposits from its parent company, under a plain reading of the FDIA, it could not be engaged in the business of receiving deposits from its customers. As a result, the judge concluded that "this Court does not have federal question jurisdiction, and there is no federal preemption." *Heaton v. Monogram Credit Card Bank of Georgia*, No. 98-1823 (E.D. La. Nov. 22, 1999) (minute entry ordering remand). The judge also found diversity lacking, and noted that "if there is any doubt as to federal subject matter jurisdiction, the court should resolve the doubt in favor of remand." *Id.*

Monogram appealed. Heaton moved to dismiss the appeal for lack of appellate jurisdiction.

DISCUSSION

We begin with 28 U.S.C. § 1447(d), which provides: "An order remanding a case to State court from which it was removed is not reviewable on appeal or otherwise." Notwithstanding this broad language, the Supreme Court has explained that this provision is to be interpreted *in pari materia* with § 1447(c), such that only remand orders issued under § 1447(c) and "invoking the grounds specified therein" are immune from review. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46, 96 S. Ct. 584, 590, 46 L. Ed. 2d 542 (1976), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct.

1712, 135 L. Ed. 2d 1 (1996); *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 925 (5th Cir. 1999). Lack of subject matter jurisdiction is one basis for remand under § 1447(c). A § 1447(c) remand is not reviewable on appeal even if the district court's remand order was erroneous. *Thermtron*, 423 U.S. at 343, 96 S. Ct. at 589; *Smith*, 172 F.3d at 925; *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999). "Reviewable non-§ 1447(c) remands constitute a narrow class of cases, meaning we will review a remand order only if the district court 'clearly and affirmatively' relies on a non-§ 1447(c) basis." *Copling v. Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999); *Giles*, 172 F.3d at 336. The justification for this rule is "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Thermtron*, 423 U.S. at 351, 96 S. Ct. at 593. As a result, we have stated that "the district court is the final arbiter of whether it has jurisdiction to hear the case." *Smith*, 172 F.3d at 925.

A plain and common sense reading of the Judge Barbier's remand order reveals that he stated a § 1447(c) basis for remand. The judge specifically concluded that "this Court does not have federal question jurisdiction" and that "there is no federal preemption." He also specifically mentioned that doubt as to whether there is subject matter jurisdiction should be resolved in favor of remand. He then invoked § 1447(c) in ordering the remand. Even if Judge Barbier's conclusions that Monogram was not a state bank and that there was therefore no preemption were erroneous, we cannot review his remand order.

Monogram argues, however, that despite the clear language of the remand order, the true basis for the order was 28 U.S.C. § 1367(c)(3). Monogram thus concludes that we

have jurisdiction in this case because remand orders pursuant to § 1367(c) are subject to appellate review. *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994). Under § 1367(c)(3), a district court may decline in its discretion to exercise supplemental jurisdiction over supplemental (formerly "pendent") state law claims when the court has dismissed all claims giving rise to original jurisdiction. Monogram asserts that Judge Barbier's dismissal of Heaton's federal TILA claim, which he noted in his remand order, was the predicate for the remand of what Judge Barbier considered to be remaining state law claims. Heaton's addition of the TILA claim, according to Monogram, formed an independent basis for federal question jurisdiction, and Judge Barbier's dismissal of the claim *with* prejudice demonstrated that he thought he had subject matter jurisdiction over that claim. Therefore, Monogram argues that the remand order was necessarily pursuant to § 1367(c)(3), and Judge Barbier simply mislabeled the order as one pursuant to § 1447(c).

In making this argument, Monogram relies on our decision in *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758 (5th Cir. 1994). In that case, a panel of this Court stated:

> The critical distinction for determining appealability is the presence of federal subject matter jurisdiction prior to the order of remand. In a Section 1447(c) remand, federal jurisdiction never existed, and in a non-Section 1447(c) remand, federal jurisdiction did exist at some point in the litigation, but the federal claims were either settled or dismissed.

Id. at 762. Monogram asserts that because the TILA claim conferred federal question jurisdiction on the district court, federal jurisdiction "did exist at some point" in the suit and therefore the remand could not have been based on § 1447(c).

We reject Monogram's argument. In *Bogle*, the district court's remand order concluded that "'[t]his case does not contain a federal claim.'" *Id.* However, the court also went on to discuss the discretionary factors set forth in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988), which district courts should consider in remanding supplemental state law claims. Therefore, because the remand order in *Bogle* was at first glance somewhat ambiguous, our elucidation of the grounds for remand was required in order to determine the district court's reasons for remanding. We concluded that the district court's discussion of the discretionary factors did not taint its conclusion that subject matter jurisdiction was lacking, and therefore § 1447(c) formed the basis for the order. *Bogle*, 24 F.3d at 762.

In the instant case, however, we see no ambiguity whatsoever in Judge Barbier's remand order. Although brief, the order clearly and affirmatively stated a § 1447(c) reason for remand, because Judge Barbier concluded that he lacked subject matter jurisdiction. His citation of § 1447(c) is clearly not a "mislabeling" of the basis for remand. Nowhere in the order did the judge discuss the discretionary factors set forth in Carnegie-Mellon, nor did he cite § 1367(c)(3) or any other basis for remand.[2] In *Smith*, this Court initially reviewed the first of two remand orders in that case. Because

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[2] *But see Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999) (where the remand order was reviewable on appeal because "[t]he court specifically noted that 'this is an appealable order because the basis of my ruling is an exercise of discretion to remand pendent state law claims.'"); and *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994) (the remand order was reviewable because "[t]he district court below made clear that it was remanding Hook's state law negligence claim, i.e., her only remaining claim, pursuant to its discretion.").

the district judge granted summary judgment against the plaintiff on some of her claims but remanded a remaining state law claim, the Court interpreted the order as a discretionary remand of pendent state law claims. *Smith v. Texas Children's Hosp.*, 84 F.3d 152, 154 (5th Cir. 1996). On remand to the federal district court, the district judge entered a second order remanding the case to state court. Despite our interpretation of the first remand order, the second remand order stated: "This court does not and has never had jurisdiction over Smith's claim." The judge then ordered the remand pursuant to § 1447(c). *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 925 (5th Cir. 1999). On the appeal of this second order, we concluded that the order did not affirmatively state a non-§ 1447(c) ground for remand, and therefore § 1447(d) barred appellate review. *Id.* at 927. Likewise, in the instant case, even if Judge Barbier's conclusion that he lacked subject matter jurisdiction was clearly erroneous, he did not state a non-§ 1447(c) ground for remand and we cannot review his order.

Monogram relies on decisions of other circuits in asserting that the "mere incantation" of § 1447(c) or the words of subject matter jurisdiction does not automatically render the remand order unreviewable. Further, Monogram urges us to conduct an independent review of the remand order to determine the "true" basis for the remand. However, we note that in *Bogle*, looking at the face of the remand order we stated: "The magic words 'this case does not contain a federal claim' rendered the district court's remand order unreviewable." *Bogle*, 24 F.3d at 762.[3]

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[3] *See also McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 n.1 (5th Cir. 1991) (noting that the grounds for reviewing remand orders have expanded, and admonishing district courts to

Monogram also argues that we must apply our decision in *In re Digicon Marine, Inc.*, 966 F.2d 158 (5th Cir. 1992), and conclude that we are not bound by Judge Barbier's "erroneous characterization" of his reasons for remanding. However, *Digicon Marine* supports, rather than contradicts, our holding today. In that case, the trial court granted a motion to remand based on the lack of authority to remove a maritime case under 28 U.S.C. § 1441(b). *Id.* at 159. Later, in an order denying reconsideration, it stated that the earlier ruling was based upon a lack of subject matter jurisdiction. *Id.* We concluded that "[d]espite the district court's description of the remand as one based on a lack of subject matter jurisdiction in its order on reconsideration, the district court's original remand order clearly indicates on its face that the remand was not based upon lack of original subject matter jurisdiction . . ." *Id.* at 160. In the instant case, Judge Barbier

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"take care to explain their reasons for remanding cases" because "the availability and means of appellate review turns exclusively on the district court's reason for remand."); *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023, 1026 (5th Cir. 1991) ("Reviewability of a remand order depends entirely upon the trial court's stated grounds for its decision to remand."); *Richards v. Federated Dep't Stores, Inc.*, 812 F.2d 211 & n.1 (5th Cir. 1987) (the remand order "is proof against review even if it merely 'purports' to remand on the ground quoted."); and *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 644 (5th Cir. 1978) ("If . . . the remand order states that it is based on 1447(c) statutory grounds, it is immune from review by an appellate court.").

Monogram suggests these decisions may be inapplicable because they dealt with cases originated before the December 1, 1990 effective date of § 1367. However, the Supreme Court clearly approved discretionary remands of pendent state law claims as early as 1988 in *Carnegie-Mellon*. Moreover, because of our holding today that Judge Barbier's order was based solely on § 1447(c) grounds, we see no reason why these cases are inapposite.

did not discuss his reasons for remanding in any order outside the remand order itself. Just as in Digicon Marine, in this case we need only look to the face of the remand order to determine his reasons for remanding. We cannot read the remand order to say that the court "clearly and affirmatively" relied on a non-§ 1447(c) basis as required by *Copling v. Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999) and *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999). The face of the order clearly states a § 1447(c) basis for remand.[4]

We think adopting Monogram's position that we interpret the remand order as one pursuant to § 1367(c)(3) would basically require us to conclude that Judge Barbier remanded the case for the wrong reasons. That approach would essentially amount to an appellate review of the order, which Congress has clearly forbidden us to do under § 1447(d). Monogram urges that "[p]ublic policy considerations strongly militate in favor of allowing this appeal to be maintained." Appellant's Reply Brief at 10. It argues that allowing district courts to insulate their remand orders from appellate review by "intoning the words 'subject matter jurisdiction'" would unleash "unreviewable mischief" and deny litigants their right of appeal of § 1367(c)(3) remand orders. *Id.* Although we seriously doubt Monogram's prediction, we think the "public policy" decision is one for Congress to make, and one which it has already made in the plain language of § 1447(d). In

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[4] Moreover, we note that *Digicon Marine* points out that when a remand is reviewable on appeal, a district court may reconsider and vacate its own order. *Digicon Marine*, 966 F.2d 158, 160-61, quoting *In re Shell Oil Co.*, 932 F.2d 1523, 1528 (5th Cir. 1991). However, Monogram did not seek a reconsideration or amendment of Judge Barbier's order to reflect its position that the order was really based on § 1367(c)(3).

enacting § 1447(d), "Congress struck the balance of competing interests in favor of judicial economy." *Smith*, 172 F.3d at 925.[5]

We recognize that the merits of this case present significant questions of law concerning the interpretation of the FDIA and the ability of courts to "second-guess" the FDIC's determinations about whether financial institutions are "state banks" under the FDIA. However, we note that because we construe the remand order as jurisdictional in nature, the district court's determinations as to Monogram's substantive preemption defense will have no preclusive effect on the state court. *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999).

We think Judge Barbier clearly intended to base his order on § 1447(c). Having concluded that he lacked subject matter jurisdiction over the case, however, Judge Barbier lacked jurisdiction to grant Heaton's motion for voluntary dismissal with prejudice. Such a ruling is a judgment on the merits. *See Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (5th Cir. 1980). In *Bogle*, the district court remanded the case because it believed that it lacked subject matter jurisdiction, yet it granted the plaintiff a partial nonsuit with prejudice of the claims that formed the basis of the defendant's removal petition. *Bogle v. Phillips Petroleum*

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[5] *See also Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1027 (5th Cir. 1998) ("[T]he [Supreme] Court has recognized that § 1447(d) intends to insulate from appellate review a district court's determinations as to its subject matter jurisdiction . . . ."); and *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023, 1024 (5th Cir. 1991) ("The trial court brought its remand order within the absolute immunity from review of 28 U.S.C. § 1447(c) by expressly referring to a lack of jurisdiction as one of the bases of its decision to remand.").

Co., 24 F.3d 758, 762 (5th Cir. 1994). We held that order was void and of no effect. We reach the same conclusion here. The order dismissing Heaton's TILA claim is void.[6]

CONCLUSION

Because we have concluded that we lack jurisdiction in this case, we DISMISS Monogram's appeal pursuant to 28 U.S.C. § 1447(d).

APPEAL DISMISSED.

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[6] We realize that because of our holding today, Monogram may file another petition for removal based on the TILA claim once this case is returned to state court. We are aware that this result may conflict with the policy of judicial economy embodied in § 1447(d). However, we are constrained by the language of Judge Barbier's remand order that he felt he had no subject matter jurisdiction in this case, and therefore we can reach no other result but that Judge Barbier was not empowered to render a ruling on the merits.

Appendix B

United States District Court
Eastern District of Louisiana

PATRICIA HEATON, on behalf of herself and all others similarly situated	Civil Action No. 98-1823
v.	Section "T" (2)
MONOGRAM CREDIT CARD BANK OF GEORGIA	

Oct. 7, 1998.

ORDER AND REASONS

PORTEOUS, District J.

Before the Court is a motion by plaintiff Patricia Heaton to remand the above captioned case to the Civil District Court for the Parish of Orleans due to a lack of subject matter jurisdiction. After hearing oral arguments and reviewing the record and memoranda submitted by the plaintiffs and defendants, the court finds that it has subject matter jurisdiction.

BACKGROUND

In October 1995, plaintiff entered into a credit card contract with the defendant. Thereafter, defendant provided plaintiff with a "Campo" credit card, allowing her to shop at Campo

Appliances on credit. On May 11, 1998, plaintiff filed a class action suit in state court alleging that defendant improperly calculated and charged her "late fees" and alleging defendant violated the Louisiana Consumer Credit Law by charging her more than the statutorily allowed $15 late fee. On June 19, 1998, defendant timely removed this case to federal court alleging diversity jurisdiction and federal question jurisdiction.

LAW AND ANALYSIS

The standard regarding removal and remand is set forth in 28 U.S.C. § 1447(c) which states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

Removal of cases initially filed in the state court is governed by 28 U.S.C. § 1441. Section 1441(a) permits removal of "any civil action brought in a state court of which the district courts of the United States have original jurisdiction." United States Courts have original jurisdiction of "all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. The jurisdictional framework governing the removal of federal question cases is centered on the well-pleaded complaint rule. It is long-settled law that a cause of action "arises under" federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. *Gully v. First National Bank*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936).

A state-created cause of action may arise under federal law if the resolution of the dispute depends on the validity, construction or effect of federal law, so long as the federal question is a real and substantial issue. *Shultis v. McDougal*,

225 U.S. 561, 569, 32 S. Ct. 704, 56 L. Ed. 1205 (1912), and its resolution is an essential element of the plaintiff's case. *Gully*, 299 U.S. at 112.

The Federal Deposit Insurance Act (FDIA) is implicated in this case because the defendant is a state bank.[1] Title 12 U.S.C. § 1831d(a) states that, "[i]n order to prevent discrimination against State-chartered insured depository institutions, . . . if the applicable rate prescribed in this subsection exceeds the rate such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section . . . take, receive, reserve and charge on any loan . . . or other evidence of debt, . . . at the rate allowed by the laws of the State . . . where bank is located." Defendant asserts that this provision of the FDIA completely preempts claims alleging that credit card late fees exceed the limit allowed by Louisiana's Consumer Credit Law, thus establishing federal question jurisdiction over plaintiff's claims.

The amount of interest Monogram charges its customers is, not only a "real and substantial issue" in this case, it is at the heart of the class action suit. And although plaintiff filed this suit under Louisiana law, federal law clearly is implicated in the claim. Given the plain language of the statute and considering the FDIC's position that Monogram is a "state bank" within the meaning of the statute, this Court finds that

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[1] Plaintiff argued that because defendant is a "credit card" bank under the laws of Georgia, it is not in the "business of receiving deposits" and is therefore not a "state bank." However, the Federal Deposit Insurance Corporation considers defendant a "state bank" under the provisions of Section 3(a)(2) of 12 U.S.C. 1813(a)(2). (Doc. 15. Ex. A.).

this claim arises under federal law and that the FDIA preempts the Louisiana Consumer Credit Law.[2]

As this Court finds federal question jurisdiction, it is unnecessary to address plaintiff's arguments regarding the applicability of attorneys fees to the named plaintiff in class action suits to the amount in controversy for diversity jurisdiction.

Accordingly,

IT IS ORDERED that the Plaintiff's Motion to Remand this case to the Civil District Court for the Parish of Orleans is hereby DENIED.

New Orleans, Louisiana, this
7th day October, 1998.

G. Thomas Porteous, Jr.
United States District Judge

[2] Plaintiff, in oral argument, agreed that such a finding would confer federal jurisdiction.

Appendix C

Minute Entry
Barbier, J.
November 25, 1998

United States District Court
Eastern District of Louisiana

PATRICIA HEATON, on behalf of herself and all others similarly situated — Civil Action No. 98-1823

versus

Section "J" (2)

MONOGRAM CREDIT CARD BANK OF GEORGIA

Before the court is plaintiff's "Motion to Amend Order to Include Statement Prescribed by 28 U.S.C. § 1292(B)" and "Petition for Permission to Appeal" which are set for hearing on November 25, 1998 at 9:30 a.m. on the briefs. Defendant opposes the motion and petition. For the following reasons, plaintiff's motion and petition are denied.

BACKGROUND AND FACTS

Plaintiff originally filed this class action suit in state court alleging, in part, violations by defendant of the Louisiana Consumer Credit Law due to excess late fee charges. Defendant removed the action to federal court and plaintiff attempted to have the case remanded to state court. In denying the remand motion, Judge Porteous concluded that

defendant was a state bank as defined by Section 3(a)(2) of 28 U.S.C. 1813(a)(2). As such, Judge Porteous found that plaintiff's claim arises under federal law and that the Federal Deposit Insurance Act, 12 U.S.C. § 1831(d), preempts the Louisiana Consumer Credit Law. Plaintiff now seeks to appeal this interlocutory order.

DISCUSSION

Title 28, § 1292(b) of the United States Code lists three criteria which must be met before entry of an interlocutory appeal is proper: 1) there must be a controlling question of law involved; 2) there must be substantial ground for difference of opinion on that question of law; and 3) an immediate appeal must materially advance the ultimate termination of the litigation. *Aparicio v. Swan Lake*, 643 F.2d 1109, 1110 n.2 (5th Cir. 1981). Interlocutory appeals should be granted only in exceptional situations where allowing an appeal would avoid protracted and expensive litigation. *Clark-Dietz & Assoc. v. Basic Construction*, 702 F.2d 67 (5th Cir. 1983).

The court finds that an appeal is not proper in the present case for two reasons. First, plaintiff has not shown that an appeal will advance the ultimate termination of the litigation. Plaintiff simply points out that if the appellate court were to reverse this court, the case would be remanded. As pointed out by defendant, however, there is another basis for federal jurisdiction which was not resolved by this court which could be asserted after appeal. Additionally, remand does not amount to the termination of the litigation.

Further, the court concludes that plaintiff has not shown a substantial ground for difference of opinion as to whether

defendant is a state bank. Plaintiff cites no authority for the contention that defendant is not a state bank.

Accordingly,

IT IS ORDERED that plaintiff's "Motion to Amend Order to Include Statement Prescribed by 28 U.S.C. § 1292(b)" and "Petition for Permission for Appeal" are denied.

Appendix D

Minute Entry
Barbier, J.
November 22, 1999

United States District Court
Eastern District of Louisiana

PATRICIA HEATON, on behalf of herself and all others similarly situated — Civil Action No. 98-1823

versus

Section "J" (2)

MONOGRAM CREDIT CARD
BANK OF GEORGIA

Before the Court is plaintiff's Motion for Reconsideration (Rec. Doc. 78) of her Motion to Remand. Defendant opposes the motion. The motion, set for hearing on November 10, 1999, is before the Court on briefs and oral argument.

In the motion, plaintiff moves to reconsider the court's earlier denial of her motion to remand. Plaintiff primarily argues that defendant, Monogram Credit Card Bank of Georgia, is not a "state bank" as defined in the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1813(a)(2), and, therefore, federal question jurisdiction is not present and federal preemption does not apply.

Defendant argues that plaintiff has waived any objection to the earlier denial of the motion to remand, because she has

since voluntarily amended her Complaint to assert a federal question, namely, a claim under the Truth in Lending Act ("TILA").[1]

The Court, however, finds that no waiver has occurred in this particular case. The cases relied upon by defendant are distinguishable in that there had either been no objection to jurisdiction to begin with, *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200, 1202-03 (5th Cir. 1997), or there had been a judgment on the merits, *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 546 (5th Cir. 1990).

With respect to the merits of plaintiff's motion to remand, the Court must determine whether Monogram, a "credit card" bank chartered by the state of Georgia, is a "state bank" within the meaning of the FDIA. Under the statute, a "state bank" is defined as "any bank . . . which is engaged in the business of receiving deposits . . . , and is incorporated under the laws of any state . . . ." 12 U.S.C. § 1813(a)(2).

Because case law appears silent on this precise point,[2] the Court relies upon a reading of the plain language of the statute and concludes that, although Monogram receives "deposits" from its parent company, it is not engaged in the "business of receiving deposits" from its customers.

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[1] The Court notes that plaintiff has moved to voluntarily dismiss her TILA claims, which the Court has granted.

[2] Monogram relies on *Meriden Trust & Safe Deposit Co. v. Federal Deposit Ins. Corp.*, 62 F.3d 449 (2d Cir. 1995), as authority for its argument that it should be considered to be a "state bank" under the FDIA. However, that case is distinguishable because the bank in that case was originally chartered as a commercial bank, unlike Monogram which has never been anything but a credit card bank.

Accordingly, under the plain language of the statute, Monogram is not a "state bank." Therefore, this Court does not have federal question jurisdiction, and there is no federal preemption.

As for whether diversity jurisdiction is present, the Court notes that plaintiff seeks an award of attorney's fees not as a separate element of damages, but rather as class representative under La. C. Civ. P. Art. 595. This Court has previously considered this same question and has held that such attorney's fees should not be aggregated and attributed to the class representative for purposes of determining if the requisite jurisdictional amount exists for diversity jurisdiction. *See Jones v. The Valvoline Co.*, 98-557, 1999 WL 319215 (E.D. La. May 20, 1999).

The Court is also cognizant of the well recognized principle that, if there is any doubt as to federal subject matter jurisdiction, the court should resolve the doubt in favor of remand since it is presumed that a federal court lacks jurisdiction until it has been demonstrated to exist. *See, e.g., Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 792 (U.S.App.D.C.1983). Accordingly,

IT IS ORDERED that plaintiff's Motion for Reconsideration is GRANTED and the above captioned matter should be and is hereby REMANDED to Civil District Court for the Parish of Orleans, pursuant to 28 U.S.C. § 1447(c).

Appendix E

United States District Court
Eastern District of Louisiana

PATRICIA HEATON, on behalf of herself and all others similarly situated Plaintiff, v. MONOGRAM CREDIT CARD BANK OF GEORGIA Defendant.	Civil Action No. 98-1823 c/w 99-2603 Section "J" Magistrate 1

ORDER

Considering Plaintiff's Motion to Dismiss with Prejudice,

IT IS HEREBY ORDERED that Plaintiff's claim under the Truth in Lending Act is hereby dismissed with prejudice. All other claims asserted by Ms. Heaton, including those asserted under the Louisiana Consumer Credit Law, are hereby reserved.

New Orleans, Louisiana, this 22 day of November, 1999.

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JUDGE

Appendix F

United States Court of Appeals,
Fifth Circuit.

No. 99-31341

Jan. 5, 2001

Patricia HEATON, Plaintiff-Appellee,
v.
MONOGRAM CREDIT CARD BANK OF GEORGIA,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING EN BANC

(Opinion 11/2/00), 5th Cir., _____, _____ F.3d _____

Before Duhe, Emilio M. Garza and DeMoss, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing

is DENIED. The court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Chief Judge King and Judge Benavides did not participate in the consideration of the petition for rehearing en banc.

Appendix G

Statutory Provisions Involved

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 89--DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over

such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.